STATE OF WISCONSIN CIRCUIT COURT Branch 9 DANE COUNTY

THE LEAGUE OF WOMEN VOTERS OF WISCONSIN, et al.,

Plaintiffs,

v.

Case No. 19-CV-84
Case Code 30701 & 30704

DEAN KNUDSON, et al.,

Defendants,

THE ELECTIONS COMMISSION DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS

INTRODUCTION

The plaintiffs filed suit seeking a declaration that the laws enacted in the extraordinary session of December 2018 are unconstitutional and have sought to enjoin the implementation of those laws. The amended complaint spans 33 pages and makes numerous allegations regarding the passage of 2017 Wisconsin Acts 368, 369 and 370 as well as the confirmation of 82 nominees to various positions throughout state government.

The amended complaint identifies the Elections Commission Defendants in paragraphs 8-12 and then never mentions these defendants again. There are no allegations that the Elections Commission Defendants took any unlawful action or failed to take an action they were required to take. There is no prayer for relief against any of these defendants. The complaint is fatally

defective as it pertains to the Election Commission Defendants and they should be dismissed from this lawsuit.

I. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM AGAINST THE ELECTIONS COMMISSION DEFENDANTS

Sec. 802.02 stats provides:

> **(1)** Contents of pleadings. A pleading or supplemental pleading that sets forth a claim for relief, whether an original or amended claim, counterclaim, cross claim or 3rd-party claim, shall contain all of the following:
>
> **(a)** A short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief.
>
> **(b)** A demand for judgment for the relief the pleader seeks.

Once the complaint is filed, the defendants are required to either answer the complaint, seek a more definite statement or move to dismiss the complaint. Sec. 802.06 stats provides:

> **(a)** Every defense, in law or fact, except the defense of improper venue, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or 3rd-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
> **1.** Lack of capacity to sue or be sued.
> **2.** Lack of jurisdiction over the subject matter.
> **3.** Lack of jurisdiction over the person or property.
> **4.** Insufficiency of summons or process.
> **5.** Untimeliness or insufficiency of service of summons or process.
> **6.** Failure to state a claim upon which relief can be granted.
> **7.** Failure to join a party under s. 803.03.
> **8.** Res judicata.
> **9.** Statute of limitations.
> **10.** Another action pending between the same parties for the same cause.

In this case, the Elections Commission Defendants rely on sec. 802.06 (2) (a)(6) as the basis of their motion.

When presented with a motion under sec. 802.06 (2) (a)(6), the court is to apply the analysis set forth in *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86 Par. 19, 356 Wis. 2d 665. The court held:

> A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint." John Doe 1 v. Archdiocese of Milwaukee, 2007 WI 95, ¶ 12, 303 Wis.2d 34, 734 N.W.2d 827 (quoting BBB Doe v. Archdiocese of Milwaukee, 211 Wis.2d 312, 331, 565 N.W.2d 94 (1997)). Upon a motion to dismiss, we accept as true all facts well-pleaded in the complaint and the reasonable inferences therefrom. Kaloti Enters., Inc. v. Kellogg Sales Co., 2005 WI 111, ¶ 11, 283 Wis.2d 555, 699 N.W.2d 205. However, a court cannot add facts in the process of construing a complaint. John Doe 67C, 284 Wis.2d 307, ¶ 19, 700 N.W.2d 180. Furthermore, legal conclusions stated in the complaint are not accepted as true, and they are insufficient to enable a complaint to withstand a motion to dismiss. Id.

In *Wilson v. Contl. Ins. Companies*, 274 N.W.2d 679, 683 (Wis. 1979), the court stated the standard as follows:

> Thus, we apply to this case the following standard: that a motion to dismiss under sec. 802.06(2)(f) usually will be granted only when it is quite clear that under no conditions can the plaintiff recover. Wulf v. Rebbun,25 Wis.2d 499, 131 N.W.2d 303 (1964) recites in the following language the standard applied to the former demurrer practice:
> "While the complaint must be liberally construed it must still state a cause of action and must fairly inform the opposite party of what he is called upon to meet by alleging specific acts.

In this case, there are no allegations against any of the Elections Commission Defendants. There is no claim for relief and the complaint only mentions the Elections Commission Defendants in the paragraphs identifying them. There are allegations in the complaint that recite harm to the plaintiffs that relate to elections, but none of the allegations state that the Elections Commission Defendants had any role in causing these harms or have any power to alleviate the alleged harms.

The complaint's failure to identify any wrongdoing by the Elections Commission Defendants forms a sufficient basis for the dismissal of the Elections Commission Defendants. However, as shown below, the Elections Commission Defendants are not necessary parties and the alleged harms related to the election laws are the subject of a separate action.

II. THE ELECTION COMMISSION DEFENDANTS ARE NOT PROPER PARTIES TO THIS ACTION.

The Wisconsin Elections Commission, ("Commission"), its individual members and administrator, have no power or authority to vote on or enact legislation. They cannot be a proper party to this action. The Commission is responsible for administering Wisconsin's elections laws, except campaign financing laws. *Wis. Stats. § 5.05(1).* The Commission is empowered to investigate election law violations, file lawsuits, issue orders and promulgate administrative rules implementing Wisconsin's election laws. The Commission has no power to enact legislation of the sort complained about in this lawsuit.

The inappropriateness of suing Elections Commission officials is illustrated by the fact that the Commission itself is bound by and unable to challenge or litigate the outcome of this case. The Commission is a creature of the statutes creating it and granting its powers. The Commission does not have the statutory authority to initiate this cause of action or challenge its outcome. *Wis. Stats. § 5.05(5t).* When faced with a binding state or federal court decision relating to election law the Commission's authority is confined to implementing the decision, issuing updated guidance to local election officials and voters, making formal advisory opinions, commencing rule-making or requesting an opinion from the Attorney General on the "applicability of the court decision." *Id.*

Notably missing from the list of the Commission's available options is litigation or appeal of court decisions.

The plaintiffs named the individual commissioners and the administrator of the Elections Commission. No commissioner may act individually to carry out any Commission function. Any action by the Commission, except an action relating to its own internal procedures, requires a two-thirds vote of the Commission. *Wis. Stats. § 5.05(1e)*. Likewise, the Commission's administrator, even as the chief elections officer in the state, is not statutorily empowered to pass legislation related to election law.

Finally, while the Plaintiffs claim that they are damaged by provisions in the Acts passed last December, the legal issue raised does not concern the substance of the election laws referenced in the amended complaint but rather the process by which those laws were enacted. The Elections Commission cannot and does not take a position in regard to that issue. The Elections Commission Defendants will be bound by any decision the court makes which impacts the validity of the election laws referenced in the amended complaint, and thereafter issue whatever guidance may be appropriate pursuant to § 5.05(5t).

III. THERE IS NO JUSTICIABLE CONTROVERSY BETWEEN THE PLAINTIFFS AND THE DEFENDANTS.

A trial court can exercise discretion to decide an action seeking declaratory relief, such as this case, only when there is a justiciable controversy. *Wisconsin Education Association Council v. Wisconsin Elections Board,* 2000 WI App 89, ¶ 9, 234 Wis. 2d 349, 610 N.W.2d 108. The following standards govern the existence of a justiciable controversy:

1) Whether a claim of right is asserted against one who has an interest in contesting it;

2) Whether the parties have adverse interests;

3) Whether the parties seeking relief have a legally protectable interest; and

4) Whether the issue in controversy is ripe for judicial determination.

Id. In the present case, standards 1, 2 and 4 are absent as to the Elections Commission Defendants.

As discussed above, the Wisconsin Elections Commission did not promulgate the legislation at issue and its officials take no position regarding the scope of the legislature's authority to enact these laws. Moreover, the sole Act at issue which impacts election laws is either currently enjoined by court order or is encompassed within administrative code provisions that are not challenged in this case.

Paragraphs 52 and 53 of the amended complaint set forth allegations that certain Plaintiffs are harmed by portions of Act 369 that impact election laws. Paragraph 52 addresses Section 1k of Act 369, which pertains to absentee voting. Paragraph 53 asserts that Sections 91-95 of Act 369 harm two of the Plaintiffs. Those sections pertain to the issuance and validity of state identification cards used for voting. The remainder of the amended complaint concerns legislation that has no bearing on the administration of elections.

In a decision issued on January 17, 2019, United States District Judge James Peterson ruled that Section 1k of Act 369 violated that court's July 29, 2016 order enjoining the defendants, all Elections Commission officials, from enforcing state imposed limits relative to absentee voting. *One Wisconsin Inst., Inc. v. Thomsen,* 15-cv-324-jdp, Dkt. No. 338 (W.D. Wis. Jan. 17, 2019). Accordingly, Judge Peterson found that the injunctions issued in July 2016, found at *One*

Wisconsin Inst., Inc. v. Thomsen, 198 F. Supp. 3d 896, 964 (W.D. Wis. 2016), applied to Section 1k of Act 369. He also found that his previous injunction applied to Section 92 of Act 369. Section 92 of Act 369 is the section of the statute that attempts to limit the use of a temporary receipt from the DMV to 60 days. A copy of Judge Peterson's January 17 Order is attached to this memorandum.

Paragraph 53 of the amended complaint states that Sections 91-95 of Act 369 codify DOT administrative rules concerning the issuance of state identification cards for voting. The administrative rules referenced are found at Wis. Admin. Code § Trans 102.15. Section 91 of Act 369 largely overlaps with § 102.15, as the plaintiffs allege. The remaining sections, 93-95, also pertain to the issuance of state identification cards, part of the overall "defective system" addressed in the complaint.

The present lawsuit does not challenge the lawfulness of these administrative code provisions. Requirements for the issuance and permitted use of state identification cards will remain in place, regardless how this lawsuit unfolds. Moreover, the Elections Commission does not issue state identification cards and has no control over that process. Since some of the aspects of Act 369 at issue here are enjoined by virtue of Judge Peterson's rulings, and the other aspects of Act 369 allegedly damaging the Plaintiffs will remain intact as code provisions, the Plaintiffs' requested relief insofar as elections laws are concerned is a moot point at this juncture.

CONCLUSION

For the reasons stated above, Defendants Dean Knudson, Jodi Jensen, Julie Glancey, Beverly Gill, Ann Jacobs, Mark Thomsen, and Meagan Wolfe respectfully request that the court enter an order dismissing them from this case.

Dated: 2/22/19

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ONE WISCONSIN INSTITUTE, INC., CITIZEN ACTION OF WISCONSIN EDUCATION FUND, INC., RENEE M. GAGNER, ANITA JOHNSON, CODY R. NELSON, JENNIFER S. TASSE, SCOTT T. TRINDL, MICHAEL R. WILDER, JOHNNY M. RANDLE, DAVID WALKER, DAVID APONTE, and CASSANDRA M. SILAS,

Plaintiffs,

v.

MARK L. THOMSEN, ANN S. JACOBS, BEVERLY R. GILL, JULIE M. GLANCEY, STEVE KING, DON M. MILLS, MICHAEL HAAS, MARK GOTTLIEB, and KRISTINA BOARDMAN,
all in their official capacities,

Defendants.

ORDER

15-cv-324-jdp

Plaintiffs contend that 2017 Wisconsin Act 369, enacted by the Wisconsin legislature in December 2018, violates injunctions issued in this case in 2016. So plaintiffs seek an order enforcing the injunction against three provisions of Act 369: (1) limits on the time for in-person absentee voting; (2) restrictions on the use of student identification cards for voting; and (3) a time limit on the validity of temporary identification cards issued under the ID Petition Process. Dkt. 330. The court will grant plaintiffs' motion to enforce the injunctions. This is not a close question: the three challenged provisions are clearly inconsistent with the injunctions that the court has issued in this case.

ANALYSIS

The court retains jurisdiction to enforce its own orders even while the appeal is pending, as all parties agree. *Frank v. Walker*, 835 F.3d 649, 652 (7th Cir. 2016) ("The Western District has the authority to monitor compliance with its injunction, and we trust that it will do so conscientiously . . ."). The question is whether the challenged provisions fall within the scope of the injunctions issued in this case. The parties debate the legislative intent behind Act 369, but the court need not resolve that issue to decide plaintiffs' motion. Regardless why the state legislature enacted the law, all the provisions at issue are encompassed by the injunctions and are therefore enjoined.

Plaintiffs first challenge § 1k of Act 369, which states that in-person absentee voting, or early voting, may occur "no earlier than 14 days preceding the election and no later than the Sunday preceding the election." Section 1k violates the court's July 29, 2016 order, which enjoined defendants from enforcing "[t]he state-imposed limits on the time for in-person absentee voting, with the exception of the prohibition applicable to the Monday before election day." *One Wisconsin Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 964 (W.D. Wis. 2016). At the time the court issued the injunction, one of those limits was a 10-day window for in-person absentee voting. *Id.* at 931. Although Act 369 expands the early voting window slightly, it is still a "state-imposed limit[] on the time for in-person absentee voting," so it violates the injunction.

Defendants' arguments to the contrary are not persuasive. First, defendants say that the court's injunction was directed at specific laws in effect at the time and that Act 369 is a new law, so it falls outside the scope of the injunction. But the scope of the injunction relates to conduct that the court concluded was unlawful; the particular statutory provisions at issue are

not important. If the court accepted defendants' argument, it would mean that a legislative body could evade an injunction simply by reenacting an identical law and giving it a new number.

Second, defendants say that Act 369 changes the scope of the law by eliminating some restrictions on in-person absentee voting that the court found to be unlawful. For example, the new law does not place restrictions on hours or locations for in-person absentee voting. According to defendants, "[t]hese changes address the Court's concerns with the old enjoined law that were considered at trial," so "[e]njoining the new law cannot be justified as necessary to maintain the status quo." Dkt. 333, at 8. This argument ignores the fact that the court concluded that each restriction was independently unlawful and enjoined them separately. Defendants do not point to any language in the court's opinion or injunction in which the court relied on the cumulative effect of the voting restrictions as justification for enjoining them. A party cannot avoid an injunction by complying with parts of it while disregarding others.

Third, defendants rely on two cases to support the proposition that the new law moots plaintiffs' challenge to the restrictions on in-person absentee voting, *Zessar v. Keith*, 536 F.3d 788 (7th Cir. 2008), and *Bradley v. Work*, 154 F.3d 704 (7th Cir. 1998). But both *Zessar* and *Bradley* are readily distinguishable.

In *Zessar*, the district court held that a state law about absentee voting violated the Due Process Clause because it did not require election officials to give the voter timely notice if her vote was rejected. 536 F.3d at 791. The court of appeals held that the state legislature mooted the claim when it enacted a new provision that required election officials to give the voter notice of a rejection "before the close of the period of counting provisional ballots." *Id.* at 792

(citing 10 ILCS 5/19–8(g–5) (2006)). In *Bradley*, the court of appeals affirmed the decision of the district court that it could not consider a challenge under the Voting Rights Act to Indiana's system of selection of state-court judges after the state changed the electoral process. *Bradley*, 154 F.3d at 710.

Neither of these cases is instructive. Neither case raised questions about the scope of a district court's injunction. And both cases involved new laws that made substantial changes to the challenged conduct. In this case, the new law still restricts the amount of time that a municipality may offer in-person absentee voting. Defendants do not even attempt to show that that there is a material difference between the number of days permitted under Act 369 and the number of days permitted under the previous law. The bottom line is that § 1k includes a restriction that is inconsistent with the court's injunction, so that restriction is enjoined.

Plaintiffs also challenge § 1 and § 92 of Act 369. Section 1 prohibits a voter from using an expired student ID; § 92 prohibits a voter from using a temporary ID for more than 60 days.

Defendants acknowledge that both provisions fall within the scope of the injunctions issued in this case. *See One Wisconsin*, 198 F. Supp. 3d at 964 ("The prohibition on using expired, but otherwise qualifying, student IDs is unconstitutional under the First and Fourteenth Amendments to the United States Constitution" and "defendants are permanently enjoined from enforcing" that prohibition); Dkt. 293, at 8 (requiring that temporary IDs be valid for at least 180 days). But defendants say that the point of enacting the provisions was not to defy the court's order. Rather, defendants say, the legislature amended the pertinent statutory provisions for other reasons that have nothing to do with the conduct enjoined by the court. (Section 1 also added language about IDs issued by technical colleges and § 92 also added language that requires state officials to provide a receipt to an applicant for an ID card.)

Defendants say that the language that prohibits voters from using expired student IDs or temporary IDs more than 60 days old was included in the provisions simply to anticipate the possibility that the court of appeals will uphold the provisions. *Id.* at 13–15. And, the argument goes, there is "no reason to think" that officials will not follow the court's injunctions despite § 1 and § 92 of Act 369, so enjoining those provisions would be "redundant and unnecessary" while the appeal is pending. Dkt. 333, at 13–15.

This argument is inconsistent with the rest of defendants' brief. In arguing against enjoining § 1k, defendants contend that the new law moots the existing injunction. But in the context of § 1 and § 92, defendants argue that a new law is covered by the existing injunction, so there is no need to enjoin it. This inconsistency is persuasive evidence that it may not be clear to election officials whether § 1 and § 92 mooted the injunction or whether those sections are enjoined. So the court will grant plaintiffs' motion as to those provisions as well.

ORDER

IT IS ORDERED that plaintiffs' motion to enforce the court's injunctions, Dkt. 330, is GRANTED. The injunctions issued in this case apply to the challenged portions of §§ 1, 1k, and 92 of 2017 Wisconsin Act 369.

Entered January 17, 2019.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge